

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
**REGION 9**

XPO LOGISTICS FREIGHT, INC.,

Employer,

and

Case 09-RC-262066

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS (IBT) LOCAL 100,

Petitioner.

**EMPLOYER’S REQUEST FOR REVIEW OF THE**  
**REGIONAL DIRECTOR’S DECISION ON OBJECTIONS,**  
**ORDER DIRECTING HEARING AND NOTICE ON CHALLENGED BALLOTS**

Now comes the Employer, XPO Logistics Freight, Inc. (“XPO”), through its counsel, and pursuant to Sections 102.67 and 102.69(c)(2) of the Board’s Rules and Regulations, requests review of the Regional Director’s Decision on Objections, Order Directing Hearing and Notice of Hearing on Challenged Ballots dated September 16, 2020 (the “Decision”).

**SUMMARY OF THE XPO’S POSITION**

The Board should reverse the Decision and overrule the International Brotherhood of Teamsters (IBT) Local 100’s (the “Union”) objections, and sustain XPO’s challenges to the two former employees who are ineligible to vote. A hearing is not necessary to determine that the Union’s objections are without merit, and that XPO’s challenged ballots should be void as the Union has not produced any evidence refuting the grounds of XPO’s challenges.

**FACTS**

The Union filed the instant representation petition on June 23, 2020 seeking a mail ballot election. On June 25, 2020, the parties reached a Stipulated Election Agreement (the “Agreement”), which set forth specific timeframes for the mailing of ballots from the Region to

the eligible voters, the return of the ballots from the eligible voters to the Region, the counting of the ballots, and the protocol for eligible voters to request duplicate ballots, if necessary. (Exhibit “A,” ¶ 4.) The Agreement also states that “[i]neligible to vote are employees who have quit or been discharged for cause after the designated payroll period for eligibility.” (*Id.* at ¶ 5.)

The next day, on June 26, 2020, the Region sent the parties a correspondence setting forth the timeframes and requirements for XPO’s submission of the Voter List, the posting and distribution of the Notice of Election, and again, reciting the agreed-upon timeframes for sending and receiving ballots, requesting duplicate ballots, and the ballot count. (Exhibit “B.”) Specifically, the parties agreed, and the Region approved, of the following:

- XPO must provide the Voter List to the Region by July 6, 2020;
- XPO must post and distribute the Notice of Election (Exhibit “C”) before 12:01 a.m. on July 22, 2020;
- The Region will send the mail ballots to the voters at 4:30 p.m. on July 27, 2020;
- Voters are to notify the Region if the mail ballot is not received or a replacement is needed by August 7, 2020;
- The Region is to receive the mail ballots from voters by August 17, 2020; and
- The ballot count will take place virtually at 12:00 p.m. on August 18, 2020.

(*Id.*)

The Notice of Election, which XPO timely posted, provided specific instructions to employees regarding the mail ballots. For instance, on the first page of the notice, voters are instructed that “[v]oters must sign the outside of the envelope in which the ballot is returned,” and warned that “**[a]ny ballot received in an envelope that is not signed will be automatically void.**” (*Id.*) (emphasis in original.) Further, page three of the Notice of Election includes the following instructions, amongst others:

- “If you submit a ballot with marking inside, or anywhere around, more than one square, your ballot will not be counted. You may request a new ballot by calling the Regional Office at the number below.”
- “Sign the back of the yellow return envelope in the space provided. To be counted, the yellow return envelope must be signed.”
- **“To be counted, your ballot must reach the Regional Office by Monday, August 17, 2020.”** (emphasis added).

The ballot count was conducted on August 18, 2020 at 12:00 p.m. via Zoom, and resulted in a tally of 60 votes against the Union and 54 votes in favor of the Union.

#### **A. *XPO’s Challenged Ballots***

During the ballot count, XPO challenged two ballots. First, XPO challenged the ballot of Raymond Grayson (“Grayson”) on the grounds that he voluntarily resigned from XPO on June 30, 2020, after XPO has prepared the Voter List, but before the ballots were sent out by the Region on July 27, 2020. Specifically, on June 30, Grayson called his supervisor before the start of his shift and resigned immediately as he accepted another position with a different employer.

Second, XPO challenged the ballot of Jerry Smith (“Smith”) on the grounds that he no longer works for XPO. Specifically, Mr. Smith went out of work on a leave of absence from May 14, 2019 to July 4, 2019. Mr. Smith never returned to work after the expiration of his leave of absence and, therefore, voluntarily terminated his employment with XPO, effective July 4, 2019.

At the time of the ballot count, these challenged ballots were deemed to be insufficient to affect the results of the election.

#### **B. *Void Ballots***

The Region also declared six ballots void during the ballot count. Specifically, four ballots were declared void because they were not signed, one ballot was declared void because the voter’s name was printed, and one ballot was declared void because it was mutilated - it was ripped in half, with only the half marked “Yes” included in the envelope.

**C.     *The Union's Objections***

The Union filed six objections on August 25, 2020 (the "Objections"). For one, notwithstanding the clear instructions on the Notice of Election and otherwise, the Union argues that the Region improperly declared the four unsigned ballots void because the voters were not issued duplicate voting kits. Similarly, the Union alleged that the voter who submitted the ballot with a printed name should have been sent a duplicate voting kit. Additionally, the Union alleged that the Region declared one ballot void because the voter failed to put the ballot in the blue envelope and seal the envelope. The Union also included two allegations regarding the Region's use of a letter opener to open ballots -- one objection stated that the Region damaged a valid ballot with a letter opener and another objection suggests that the letter opener may have been responsible for the mutilated ballot that was ripped in half. Finally, the Union alleged that two ballots were actually returned by mail to the Region in time to be counted.

**D.     *The Decision***

The Regional Director issued the Decision on September 16, 2020. As an initial matter, the Regional Director overruled three of the Union's objections: that the Region improperly declared a ballot void because the voter had not placed the marked ballot in a blue envelope; that the Region damaged a ballot with a letter opener; and that two voters mailed their ballots to the Regional office in time to be received before the count.

However, the Regional Director sustained three of the Union's objections. The Regional Director sustained the Union's objections concerning the unsigned ballots. Specifically, the Regional Director held that the Regional Office should have sent the voters duplicate ballots since the unsigned ballots were delivered before the ballot count, on August 6, 2020, August 11, 2020 (two ballots were received on this date), and August 14, 2020.

For similar reasons, the Regional Director sustained the Union's objection concerning the ballot with a printed name because the ballot was received on August 11, 2020, and the voter should have been sent a duplicate voting kit.

Finally, although the Regional Director held that there is no evidence that the Region was responsible for ripping the mutilated ballot in half, he sustained the Union's objection and decided to count this ballot as a "Yes" vote. The Regional Director was convinced that the voter expressed a clear preference for a "Yes" vote despite not being able to see what, if anything, this voter indicated on the second half of the ballot.

In deciding to Count this mutilated ballot as a "Yes," the Regional Director adjusted the ballot count to 60 votes against the Union, and 55 votes in favor of the Union. Accordingly, because the Regional Director sustained the Union's objections concerning five unsigned ballots, XPO's two challenged ballots are sufficient to affect the outcome of the election, and it is therefore necessary to determine the eligibility of Grayson and Smith. To that end, the Regional Director concluded that the challenges regarding Grayson and Smith raise "substantial and material issues," which require a hearing, and withheld decision as to whether the five disputed ballots warrant setting aside the election until the eligibility of the challenged voters has been determined.

### **STANDARD OF REVIEW**

Pursuant to Sections 102.67 and 102.69(c)(2) of the Board's Rules and Regulations, a request for review of the Regional Director's ruling on objections may be granted, *inter alia*, upon the following grounds:

*Grounds for review.* The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

- (1) That a substantial question of law or policy is raised because of:

- (i) The absence of; or
  - (ii) A departure from, officially reported Board precedent.
- (2) That the Regional Director’s decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

29 C.F.R. § 102.67(d), 102.69(c)(2) (“If the election has been conducted . . . by a direction of election issued following any proceeding under §102.67), the parties shall have the right to Board review set forth in §102.67”).

## **ARGUMENT**

### **I. THE REGIONAL DIRECTOR SHOULD HAVE OVERRULED THE UNION’S OBJECTIONS IN THEIR ENTIRETY**

#### **A. The Mutilated Ballot Should Remain Void**

Board precedent mandates that the mutilated ballot was properly declared void by the Board Agent during the vote tally. The Regional Director’s decision to count this ballot as a “Yes” was in error, in departure from Board precedent, and should be overturned.

The Board previously dealt with this precise situation in *Midland Steamship Line, Inc.* 58 NLRB 206 (1944), where one of the at-issue ballots “was deposited in the ballot box after it had been torn into two pieces” and “[o]ne piece bore only the square wherein a vote for one of the participating unions was indicated.” The Board in *Midland* upheld the Region’s decision to void this ballot given that half of the ballot was missing, thus preventing the Board from ascertaining the clear intent of the voter. The facts at issue here are on all fours with that of *Midland*, namely, it is impossible to ascertain the voter’s intent because only half of the ballot was deposited in the

ballot box and the Region has no idea as to what happened (or what is marked) on the other half of this ballot.

To count this mutilated ballot as a “Yes” requires the Board to speculate as to the intent of the voter. This rank speculation is precisely what the Board in *Providence Health & Serv. – Or. d/b/a Providence Portland Med. Cntr.*, 369 N.L.R.B. No. 78 (2020) recently held was not appropriate. In *Providence Health*, the Board, in announcing a new standard for deciding whether to count dual marked ballots, made clear that “**any** speculation by the Board is inconsistent with the third principle articulated in *Daimler-Chrysler*.” See *Daimler-Chrysler Corp.*, 338 NLRB 982, 983 (2003) (stating that the Board should avoid “speculation or inference regarding the meaning of atypical ‘X’s, stray marks, **or physical alterations.**”) (emphasis added). In deciding to void the dual-marked ballot because several possibilities existed as to what caused the smudged/blurred marking in the “No” square, the Board in *Providence Health* held:

Indeed, without testimony from the person who cast Ballot 1—an impossibility given that the Board is charged with conducting elections by secret ballot —any discussion of what such ballots mean in terms of “objective” intent is, by nature, speculative. Determining voter intent based on markings that could be completely unintentional is beyond the Board’s special expertise, is susceptible to becoming a subjective inquiry, and ultimately rests on speculation of the sort the Board has otherwise committed itself to avoiding. Moreover, it is not an efficient use of agency resources to engage in a potentially labor-intensive inquiry into whether, for example, a smudge or blur on a ballot was an attempt at erasure or an inadvertent marking caused by a sweaty hand or the manner in which a voter folded a ballot.

It was an error for the Regional Director to count the mutilated ballot as a “Yes” since the entire second half of the ballot was missing. The Regional Director engaged in the precise form of rank speculation prohibited by *Providence Health* to glean the “clear intent” of this voter. Thus, the Regional Director’s decision to count the mutilated ballot as a “Yes” vote should be overturned,

the ballot should be deemed void, and the count returned to 60 votes against the Union and 54 votes for the Union.

**B.     *Unsigned Ballots Are Void***

**(1)     The Region Properly Voided The Four Unsigned Ballots**

The Region held that Ballots 20, 94, 113 and 120 should not have been ruled void during the tally as the Regional Office failed to send the voters duplicate voting kits pursuant to the NLRB case handling manual. Specifically, the case handling manual provides: “If a ballot envelope is returned without signature, the election administrative professional should, **if sufficient time remains before the deadline**, send a duplicate kit with a letter explaining that failure to sign voids a returned ballot.” *See Case Handling Manual, § 11336.4(b) (emphasis added).* As relevant here, the Regional Director erred in holding that “sufficient time” remained for the Regional Office to send and receive duplicate voting kits to the voters.

Pursuant to the Stipulated Election Agreement, ballots were required to be returned to the Region by Monday, August 17, 2020, as the vote count was scheduled for Tuesday, August 18, 2020. According to the Regional Director’s Decision, the four unsigned ballots were returned to the Region on August 6, 11 (two ballots), and 14. As the ballots were required to be received by the Region on or before August 17, there was not “sufficient time” for the Region -- in the midst of the COVID-19 pandemic and concomitant impact it has had on the postal service -- to prepare letters and duplicate voting kits for these four ballots, send the letters to each the voter and allow time for the voters to sign the duplicate ballots and mail it back to the Region. This is especially so for the unsigned ballot that was received by the Region on Friday, August 14, as there was only two days, one of which was a Sunday, in between the date that the Region received the unsigned



ballot and the deadline for the Region to receive the ballot on August 17 -- a clear lack of “sufficient time” to send this voter a duplicate voter kit and have it timely returned to the Region.<sup>1</sup>

**(2) The Region Properly Voided The One Ballot With A Printed Name**

Ballot 103 was rendered void during the August 18, 2020 tally as the voter’s name was printed on the outside envelope. The Regional Director sustained the Union’s objection that this ballot should not have been rendered void because the ballot was received on August 11, 2020, and there was sufficient time to send this voter a replacement voting kit.

Unlike ballots that are unsigned (*see* Case Handling Manual, § 11336.4(b)), the Board’s case handling manual does not require the sending of a replacement voter kit upon receipt of a ballot with a printed name. The Case Handling Manual is unequivocal in that, “[b]allots that are returned in envelopes with no signatures *or* with names printed rather than signed should be voided. *Thompson Roofing, Inc.*, 291 NLRB 742 (1988).” *See* Case Handling Manual, § 11336.5(c)) (emphasis added). The Case Handling Manual only requires replacement ballots be sent out in connection with the former (unsigned ballots), not the latter (ballots with names printed). *Compare* Case Handling Manual, § 11336.4(b) with § 1136.5(c). Any conclusion to the contrary renders the distinction made in the Case Handling Manual between those ballots with no signatures and ballots with names printed meaningless.

Accordingly, there was no basis for the Regional Director to sustain this objection given that the mandate that a replacement voting kit be sent if “sufficient time” allows does not apply to ballots with printed names. Even if it did, however, there was not “sufficient time” for the Region

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<sup>1</sup> United States Postal Service delays due to the COVID-19 pandemic is precisely why the Region used three weeks instead of the standard two weeks provided for in the case handling manual as the time frame for when ballots were initially mailed out by the Region and the return deadline. *See* Case Handling Manual, § 11336.2(d). Furthermore, these delays are also why the Region, in the Stipulated Election Agreement, suggested that voters wait 11 calendar days (from July 27, 2020 until August 7, 2020) to contact the Region in the event that they did not receive a ballot.

to prepare duplicate kits for this individual with a letter, send the letter to the voter, and allow time for the voter to sign the ballot and mail it back to the Region. There was only four business days between the date this ballot was received by the Region and the deadline for ballots to be returned in order to be counted during the tally, clearly not the “sufficient time” that would have necessitated the Region sending out a replacement voter kit to this individual. Thus, this ballot should be rendered void.

## **II. THE BALLOTS CHALLENGED BY XPO SHOULD BE VOIDED**

The Regional Director directed a hearing as to XPO’s two challenged ballots. Although XPO explained during the tally that these challenges were based on the fact that these individuals are no longer employed by XPO and provided details concerning these two individuals, the Union failed to come forward during the tally (or since then) with any evidence to rebut these undisputed facts. Rather, the Union claims in a conclusory fashion that “both individuals are eligible voters.”

### **A. *Raymond Grayson***

Grayson resigned on June 30th, nearly one month before the Region mailed out the ballots on July 27, 2020. Under current Board law, to be eligible to vote in a mail ballot election, individuals must be employed “on both the payroll eligibility cutoff date and on the date they mail in their ballots to the Board's designated office.” *Dredge Operators, Inc.*, 306 NLRB 924, 924 (1992); *Sadler Bros. Trucking & Leasing Co.*, 225 NLRB No. 10 (1976). This standard was reiterated in the Agreement, which states that “[i]neligible to vote are employees who have quit or been discharged for cause after the designated payroll period for eligibility.” (Ex. “A,” at ¶ 5.) Here, Grayson could not have been employed on the date he mailed in his ballot as he resigned on June 30. Accordingly, his ballot should not be counted.

**B. *Jerry Smith***

Smith previously worked for XPO as a Driver Sales Representative. Smith went out of work on an approved leave of absence from May 14, 2019 through July 4, 2019. Smith's last day of work with XPO was May 13, 2019. Due to an oversight, Smith's employment status was still listed as active when XPO generated the Voter List. Nonetheless, Smith last worked at XPO on May 13, 2019. and his leave expired on July 4, 2019 -- more than an entire year before the ballots in this matter were sent out. As Smith was neither employed on the payroll eligibility nor on the date he mail in his ballot, he is ineligible to vote.

**CONCLUSION**

For the foregoing reasons, the Employer requests that its request for review be granted, and that the Board reverse the Regional Director's Decision, restore the count to 60 votes against the Union and 54 votes for the Union, overrule the Union's objections in their entirety, and certify the election results based on the tally conducted on August 18, 2020.

DATED: September 30, 2020

Respectfully submitted,

XPO LOGISTICS FREIGHT, INC.

*/s/ Howard M. Wexler*

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**CERTIFICATE OF SERVICE**

I, Howard M. Wexler, certify that on this date, September 30, 2020, I caused a copy of the foregoing Request for Review to be served via Electronic Filing through the Board's website and via E-mail upon:

via Electronic Filing upon:

Matthew T. Denholm, Regional Director  
National Labor Relations Board, Region 09

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By: /s/ Howard M. Wexler

Date: September 30, 2020